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Electronic Data Discovery Sanctions: The Unmapped, Unwinding, Meandering Road, and the Courts' Role in Steadying the Playing Field

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Electronic Data Discovery Sanctions: The Unmapped, Unwinding, Meandering Road, and the Courts' Role in Steadying the Playing Field

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I. INTRODUCTION

This Article highlights a growing problem for litigants who are involved in electronic data discovery (EDD). The world of litigation today encompasses massive amounts of electronically produced documents.¹

* © 2013 Ahunanya Anga. Associate Professor of Law, Thurgood Marshall School of Law. The Author thanks her family for their unwavering support, Thurgood Marshall School of Law for the 2011 research grant that made this Article possible, and Danyahel Norris, Faculty Research Librarian TMSL, for his invaluable research assistance.

1. Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches To Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. ¶ 3 (2007), <http://jolt.richmond.edu/v13i3/article11.pdf> (declaring that “[t]he explosive

It is estimated that ninety-nine percent of new information is created and stored electronically.² The litigation practice generally, as it relates to electronic discovery (e-discovery) particularly, has mushroomed into a chaotic process.³ The technological age has radically impacted the federal discovery process.⁴ The purpose of the 2006 amendments to the Federal Rules of Civil Procedure (FRCP) was, among other things, to address problems associated with electronically stored information (ESI) that arise during the litigation process.⁵

Sanctions for failure of parties to produce and retain documents important or even pivotal to the litigation are escalating.⁶ The very core of our adversarial system is threatened.⁷ Different rulings exist among courts where spoliation of ESI is involved.⁸ Litigants, without clear mandate from courts, are essentially embarking on “EDD litigation land mines.”⁹ Since the adoption of the new FRCP in 2006,¹⁰ there has been a growing rise in the imposition of sanctions by courts¹¹ based on FRCP 37.¹² Yet, even with the rise in court-imposed sanctions, decisions by

growth of ESI has changed the very nature of discovery, with new electronic complexities making the preservation and production of evidence far more challenging”).

2. David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, ¶ a.1 (Feb. 2005), <http://www.fclr.org/fclr/articles/html/2005/fedctslrev1.shtml>.

3. See Mazza et al., *supra* note 1, ¶ 3.

4. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 564 (2001).

5. For reference to this purpose, see the 2006 advisory committee’s notes to FED. R. CIV. P. 16, 26, 33, 34, 37 & 45.

6. See Mazza et al., *supra* note 1, ¶¶ 37–39.

7. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶ 2 (2007), <http://jolt.richmond.edu/v13i3/article10.pdf> (declaring that “[i]t is no exaggeration to say that litigation, as we have known it, is threatened by information’s new hyper-flow”); see also *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (discussing cost shifting in the production of electronic evidence).

8. Redish, *supra* note 4, at 619–21.

9. The Author coined this phrase.

10. See generally FED. R. CIV. P. Amendments to the Federal Rules of Civil Procedure went into effect December 1, 2006. The amendments addressed discovery of ESI.

11. See Michael F. Flanagan, *2009 Mid-Year Update on E-Discovery Cases*, GIBSON DUNN (July 8, 2009), <http://www.gibsondunn.com/publications/pages/2009Mid-YearUpdateonE-DiscoveryCases.aspx>. During the first five months of 2009, courts imposed some form of sanction mostly due to spoliation of evidence in thirty-six percent, or twenty-two, of the cases. *Id.* In comparison with the first ten months of 2008, the 2009 numbers show a two-fold increase in the number of court-imposed sanctions for e-discovery. *Id.*

12. FED. R. CIV. P. 37(f); see generally *S. New England Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82, 86–90, 96 (D. Conn. 2008) (granting the ultimate sanction of dismissal after the defendant willfully violated numerous discovery orders issued by the court, lied to the court about its ability to obtain and produce documents from third parties, and withheld and destroyed requested documents).

these courts have not helped in creating objective functional criteria that litigants can follow to avoid e-discovery sanctions.¹³ This trend led the Author to pen this Article.

Part II analyzes courts' approach to EDD violations and the different standards required for sanctionable conduct. Part III illustrates certain trends and methodologies involving sanctions that have arisen since the adoption of the 2006 FRCP.¹⁴ Part IV highlights the necessary corollary that indistinct sanctions have had on the litigation experience. Part V addresses the role of preservation in the sanctions process. Finally, Part VI concludes by examining possible solutions to ameliorate or redress the costly and often avoidable consequences of failure to comply with best practices regarding the preservation, production, and destruction of electronically generated documents that may be required during the litigation process.

II. THE COURTS' DIFFERENT APPROACHES TO SANCTIONS FOR ELECTRONIC DATA DISCOVERY VIOLATIONS

The duty to preserve includes all forms of ESI.¹⁵ As a result, EDD sanctions usually revolve around a party's failure to retain, preserve, or produce ESI.¹⁶ FRCP 37 prohibits sanctions against a party, absent exceptional circumstances, for failing to produce ESI lost because of routine, good-faith business practices.¹⁷ The rule recognizes that the massive amounts of information created must also be routinely eliminated and such elimination should not trigger liability.¹⁸ However, according

13. Robert Hardaway et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 532 (2011).

14. See FED. R. CIV. P. 26–37.

15. Shira A. Scheindlin & Jonathan M. Redgrave, *E-Discovery: Technology Requires Greater Care in Preserving Evidence*, A.B.A. J., Apr. 2008, at 53, 53 (discussing FED. R. CIV. P. 37).

16. See, e.g., *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005) (discussing the ultimate sanction of dismissal where the plaintiff failed to preserve a vehicle that was the subject of the lawsuit, resulting in extreme and incurable prejudice to the defendant); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA 03-5045 AI, 2005 WL 674885, at *5 (Fla. Cir. Ct. Mar. 23, 2005) (finding deliberate withholding of discovery and fraudulent assurances to the court and opposing counsel about completeness of production).

17. FED. R. CIV. P. 37(e).

18. See *id.*

to courts, regardless of the massive amounts of ESI produced, depending on the degree of a party's misconduct, sanctions should aptly apply.¹⁹

Courts have broad discretion in determining sanctions for spoliation.²⁰ A court's discretion is couched in the common law rules and its own inherent power to sanction as a means of regulating or controlling the course of litigation.²¹ Broad discretion has rendered the practice of law, where ESI is concerned, untenable. Courts evaluate each sanctionable violation on a case-by-case basis.²² Such evaluation lends credence to the belief that litigants cannot know if their actions are "sanctionable" until they get sanctioned.

Generally, courts prefer, where possible, to rule on the merits of a case.²³ Dismissals for spoliation of evidence are few because the role of discovery in litigation is to allow the parties to investigate and fish out as much about the dispute as possible during the time set out for discovery.²⁴ However, once there has been a determination of spoliation, courts will sanction the offending party.²⁵ Several options are available to courts when dealing with sanctionable infractions concerning ESI.²⁶ The standard used in determining sanctions often depends on whether the misconduct was negligent or grossly negligent.²⁷ For example, negligent conduct was found to be sufficient to award adverse inference sanctions in *Residential Funding Corp. v. DeGeorge Financial Corp.*, where the court found that the injured party suffered prejudice.²⁸ But, in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, the court found that failure to institute a litigation hold in a timely manner was evidence of grossly negligent conduct that would "inevitably result"

19. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 470–71 (S.D.N.Y. 2010) (discussing available remedies for spoliation based on the degree of the spoliator's misconduct).

20. *Id.* at 469.

21. GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 46–47 (2006); A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2017–18 (2011).

22. *Pension Comm.*, 685 F. Supp. 2d at 469 (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

23. *Lee v. Max Int'l, L.L.C.*, 638 F.3d 1318, 1321 (10th Cir. 2011).

24. Ahunanya Anga, *Legal Research in an Electronic Age: Electronic Data Discovery, a Litigation Albatross of Gigantic Proportions*, 9 U.N.H.L. REV. 1, 12 (2010).

25. See FED. R. CIV. P. 37(f); Michael P. Zweig & Mark J. Goldberg, *Electronic Discovery: A Brave New World*, WALL ST. LAW., July 2003, at 14, available at 7 No. 2 GLWSLAW 14.

26. See *Pension Comm.*, 685 F. Supp. 2d at 469.

27. See *id.* at 463.

28. 306 F.3d 99, 113 (2d Cir. 2002).

in spoliation of evidence.²⁹ Conversely, where a party holding relevant information fails to institute a document retention policy, courts have found that such conduct is not evidence of sanctionable conduct.³⁰ Yet, there are jurisdictions where courts have held that the absence of a litigation hold is just negligence and nothing more.³¹ This means that even the protocol of issuing litigation holds may not protect diligent litigants and may help slothful litigants because different courts give different weight to its existence or nonexistence.

III. TRENDS IN ELECTRONIC DISCOVERY DECISIONS THAT PORTRAY PATTERNS FOR POTENTIAL LITIGANTS TO BE WARY OF

Growing concern exists amongst jurists and practitioners as e-discovery matters continue to crop up in litigation.³² Jurists and practitioners are concerned because there is no set standard for what conduct merits sanctions at the federal or state level.³³ The concern is driven primarily by the ambiguity in both federal and state courts as to what extent the duty to preserve should apply when dealing with ESI.³⁴ Preservation requirements differ from jurisdiction to jurisdiction and often conflict.³⁵ There is a lot of uncertainty in cases about the state of mind required for spoliation sanctions.³⁶ Courts have noted that where conduct of the

29. 685 F. Supp. 2d at 462, 464–65.

30. See, e.g., *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010) (declaring that “[t]he failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not per se evidence of sanctionable conduct” (citing *Danis v. USN Commc’ns, Inc.*, 53 Fed. R. Serv. 3d 828, 879–80 (N.D. Ill. 2000))).

31. See, e.g., *In re Old Banc One S’holders Sec. Litig.*, No. 00 C 2100, 2005 WL 3372783, at *4 (N.D. Ill. Dec. 8, 2005) (finding that the fact that documents were lost “reflects poor judgment, and the failure to create and disseminate a comprehensive document retention policy constitutes negligence on the part of Bank One”).

32. See Daniel Wise, *Panel Urges Caution on Sanctions for Failure To Preserve E-Data*, 244 N.Y. L.J., Oct. 12, 2010, at 1, 8.

33. See *id.*

34. Michael B. de Leeuw & Eric A. Hirsch, *E-Discovery’s Oft-Overlooked Price Driver*, 244 N.Y. L.J., Nov. 15, 2010, at S4, S5.

35. *Id.* (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010)).

36. See, e.g., *Victor Stanley*, 269 F.R.D. at 533 (“The different approaches among the Circuits regarding the level of culpability that must be shown to warrant imposition of severe sanctions for spoliation is another reason why commentators have expressed such concern about the lack of a consensus standard and the uncertainty it causes.”); PAUL & NEARON, *supra* note 21, at 49.

offending party is bad, in that the party failed to preserve electronic data, the party should be sanctioned based solely on culpability.³⁷ Thus, businesses that operate in multiple states will be unable to function properly if federal circuits and states require different standards for a party to fulfill preservation obligations.³⁸ Predictability of pre-litigation discovery involving ESI may take years to sort out.³⁹ Because courts have not reached a consensus regarding preservation obligations of parties, parties are left with little alternative than to embark on costly preservation measures in order to avoid future sanctions.⁴⁰ Also, courts examine sanctionable conduct by litigants in reverse-date order.⁴¹ Therefore, what one judge decides is sanctionable may be, in degree, at odds with what another judge may deem sanctionable, which just adds to the unpredictability of the process.⁴²

Various circuits employ different standards or approaches to determine whether sanctionable conduct exists.⁴³ The three-prong approach used by the Second Circuit⁴⁴ to determine if sanctions are proper for a party's

37. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010) (determining a party's level of culpability by looking at the party's conduct during the discovery process).

38. de Leeuw & Hirsch, *supra* note 34, at S5 (quoting *Victor Stanley*, 269 F.R.D. at 523, and Judge Paul W. Grimm on his concerns regarding the conflicting standards for ESI preservation and the costs that result).

39. *Id.*

40. *Id.* (quoting *Victor Stanley*, 269 F.R.D. at 523); see also *Harmonizing the Pre-Litigation Obligation To Preserve Electronically Stored Information in New York State and Federal Courts*, ADVISORY GROUP TO N.Y. ST.-FED. JUD. COUNCIL 8-13 (Sept. 2010), <http://www.ediscoverylawalert.com/uploads/file/Advisory%20Group.pdf> (discussing the differences regarding preservation in New York State courts and federal courts).

41. See *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1324-27 (Fed. Cir. 2011). Nearly \$500,000 in attorneys' fees were awarded against the defendants as a sanction for destroying documents that should have been preserved during a patent litigation suit. *Id.* at 1317. The defendants had instituted a document retention policy whereby the company kept no records at all, while aware of active suits as well as contemplated suits. *Id.* at 1324. Although the destruction occurred before the suit was filed, the court ruled that the total amount of cases filed indicated that the defendants' discovery abuse merited a finding that the case was "exceptional" for purposes of 35 U.S.C. § 285. *Id.* at 1317, 1324.

42. Compare *Aerogroup Int'l, Inc. v. Ozburn Hessey Logistics, LLC*, No. 08 4217 (SDW) (MCA), 2011 WL 1599618, at *3 (D. N.J. Apr. 27, 2011) (reducing discovery sanctions on appeal from \$246,211 to \$10,000, finding that it was a mere discovery matter and that the party seeking sanctions for discovery abuses was not prejudiced), with *Eon-Net LP*, 653 F.3d at 1324, 1328 (sanctioning the plaintiffs for destruction of evidence caused by their failure to implement a document retention policy).

43. *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *1 (S.D. Fla. Apr. 5, 2011).

44. The states that make up the Second Circuit are Connecticut, New York, and Vermont. 28 U.S.C. § 41 (2006).

failure to preserve relevant evidence requires that (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed;⁴⁵ (2) the records were destroyed with a “culpable state of mind”;⁴⁶ and (3) the destroyed evidence was “relevant” to the party’s claim or defense “such that a reasonable trier of fact could find that it would support that claim or defense.”⁴⁷ This approach generally attempts to establish a known obligation by the offending party to preserve ESI and a failure to do so in the face of such knowledge. For example, in *Residential Funding Corp.*, the district court determined whether there was culpable conduct by examining whether Residential Funding Corporation acted in bad faith or with gross negligence.⁴⁸ However, the Court of Appeals determined that culpability is established “by a showing that the evidence was destroyed ‘knowingly, even if without intent to breach a duty to preserve it, or *negligently*.’”⁴⁹

The Second Circuit views ordinary negligence as a standard sufficient to satisfy culpability for adverse inference instructions given as a result of spoliation.⁵⁰ At the heart of this standard is the need to guard against punishing victims for the often times unintentional actions of spoliators who failed in their duties to preserve.⁵¹ In this circuit, a party failing “to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant [evidence].”⁵² Although it may seem that this standard is at odds with the safe harbor provision of FRCP 37,⁵³ the safe harbor provision of the rule shields only innocent parties from potential sanctions pending their knowledge

45. See *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

46. *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at *4 (S.D.N.Y. May 23, 2006) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)) (internal quotation marks omitted).

47. *Residential Funding Corp.*, 306 F.3d at 107 (quoting *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 109 (2d Cir. 2001) (internal quotation marks omitted) (discussing when the duty to preserve arises)).

48. *Id.* at 108.

49. *Id.* (quoting *Byrnie*, 243 F.3d at 109).

50. *Id.* (“[S]anction[s] . . . should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference.” (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991))).

51. See *Byrnie*, 243 F.3d at 107–09.

52. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

53. FED. R. CIV. P. 37(e).

of their duty to preserve.⁵⁴ Once the duty to preserve is triggered, all protections of Rule 37 are no longer available.⁵⁵ However, there is too much of a grey area in dealing with the duty to preserve, affording litigants little guidance or notice. This result was highlighted in the case of *Proctor & Gamble Co. v. Haugen*, where the court reversed the district court's dismissal order because there was no indication that Proctor & Gamble had violated its duty to preserve electronic documents requested during discovery.⁵⁶

Generally, courts use a four-tier approach to determine whether sanctions for discovery violations are permissible. Before a sanction for spoliation of evidence warrants an adverse inference instruction, there must be a finding that (1) the destroyed evidence was within the party's control;⁵⁷ (2) the party actually suppressed the evidence;⁵⁸ (3) the destroyed evidence was relevant to the claims or defenses;⁵⁹ and (4) it was foreseeable that the evidence would be discoverable.⁶⁰ The court explained in *Brewer v. Quaker State Oil Refining Corp.* that the standard was not satisfied where the destruction of evidence could have been caused by reasons unconnected to the lawsuit.⁶¹ If the Third Circuit⁶² finds spoliation of evidence, it

54. Ann G. Fort, *Rising Costs of E-Discovery Requirements Impacting Litigants*, LAW.COM (Mar. 20, 2007), http://www.law.com/jsp/article.jsp?id=900005554136&Rising_Costs_of_EDiscovery_Requirements_Impacting_Litigants&slreturn=20130128131743.

55. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (noting that the duty to preserve "arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation" (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998))); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216–17 (S.D.N.Y. 2003) (holding that the duty to preserve arose before the suit was filed because employees of the defendant who were associated with the plaintiff recognized the possibility that the plaintiff would file suit).

56. See 427 F.3d 727, 740–41 (10th Cir. 2005). Proctor & Gamble was not in possession of the electronic information the defendants requested because the information was owned and maintained by a third party. *Id.* at 739. Proctor & Gamble had only limited access to the information on a rolling basis. *Id.* Because the company did not own the information, it was under no duty to preserve it. *Id.* at 740.

57. See *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (citing *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983)).

58. *Id.*

59. *Veloso v. W. Bedding Supply Co.*, 281 F. Supp. 2d 743, 746 (D. N.J. 2003) (citing *Costello v. City of Brigantine*, No. CIV. A. 99-4072(JBS), 2001 WL 732402, at *26 (D. N.J. June 28, 2001)).

60. *Id.* (citing *Scott v. IBM Corp.*, 196 F.R.D. 233, 248 (D. N.J. 2000)).

61. *Brewer*, 72 F.3d at 334 (holding that the district court's refusal to draw an adverse inference was correct where an in-house attorney died after taking possession of a file and the defendants failed to locate the file after continuous searches).

62. The states making up the Third Circuit are Delaware, New Jersey, and Pennsylvania. 28 U.S.C. § 41 (2006).

establishes sanctions by examining the spoliator's degree of fault on balance with the prejudice caused.⁶³

Though not a four-tier approach, the Eleventh Circuit⁶⁴ does not give adverse inference jury instruction sanctions for spoliation of evidence without a showing of bad faith.⁶⁵ Further, in addition to a showing of bad faith, accusers must also show that the "missing evidence is *crucial* to their ability to prove their prima facie case."⁶⁶ Specifically, if an accuser cannot produce evidence that categorically establishes sanctionable conduct by the accused, courts will not assume that the production of certain evidence by an accuser constitutes the failure to produce other evidence by the accused.⁶⁷ This high burden of showing that evidence is crucial to a case before spoliation can be found is directly at odds with the Second Circuit's lower burden requirement of a finding of negligence.⁶⁸

The Eleventh Circuit, to further complicate the issue of spoliation sanctions, does not have a uniform definition or explanation of what

63. See, e.g., *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 335 (D. N.J. 2004) (giving the standard for determining whether spoliation sanctions are justified as "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending is seriously at fault, will serve to deter such conduct by others in the future" (quoting *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (internal quotation marks omitted))).

64. The states making up the Eleventh Circuit are Alabama, Florida, and Georgia. 28 U.S.C. § 41.

65. *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *1, *8-12 (S.D. Fla. Apr. 5, 2011) (discussing the standard for a finding granting adverse inference jury instructions as a sanction for failure to produce deleted emails).

66. *Id.* at *1; see also *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009) (stating that parties must establish "evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case" where the court found that the defendants were not put on notice that litigation was imminent and therefore the duty to preserve was not triggered).

67. See *Point Blank Solutions*, 2011 WL 1456029, at *9.

68. Compare *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1327-28 (S.D. Fla. 2010) (holding that destroyed e-mails were not crucial to the case because the plaintiff could still prove the case from evidence obtained from and through other means), with *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (finding that negligent destruction of documents may warrant sanctions).

constitutes spoliation.⁶⁹ Some courts require that the spoliator's act be intentional, while others do not.⁷⁰ For instance, in *Corporate Financial, Inc. v. Principle Life Insurance Co.*, the court failed to include an intention prerequisite in its spoliation definition.⁷¹ Yet, in the later case *Calixo v. Watson Bowman Acme Corp.*, the intention prerequisite is included in the definition of spoliation.⁷² Such confusion about what is required in a definition can cause only uneven applications and results in sanction cases.

The Fifth Circuit,⁷³ like the Eleventh Circuit, will only apply the severest sanctions of striking pleadings, granting an adverse inference jury instruction, or granting default judgment where the spoliation of evidence is as a result of bad faith or bad conduct.⁷⁴ Mere negligence is not enough to satisfy this standard because using a negligence standard would generate insufficient evidence to conclude that the spoliating party was aware of the fact that the party's case was weak.⁷⁵ The court's approach in determining culpability is illustrated in *King v. Illinois Central Railroad*, where the court concluded that there was no bad conduct to warrant an adverse inference sanction.⁷⁶ The plaintiff in *King* waited at least three years after the accident in question to request records that could show wrongdoing on the part of the defendant railroad, by which time the evidence needed had been destroyed.⁷⁷

Other circuits require a showing of bad faith to warrant spoliation sanctions, specifically the Sixth,⁷⁸ Seventh,⁷⁹ Eighth,⁸⁰ Tenth,⁸¹ and D.C.

69. *Point Blank Solutions*, 2011 WL 1456029, at *8.

70. *Id.*

71. *See* No. 05-20595-CIV, 2006 WL 3365606, at *2 (S.D. Fla. Nov. 20, 2006).

72. *See* No. 07-60077-CIV, 2009 WL 3823390, at *13, *14 (S.D. Fla. Nov. 16, 2009).

73. The states making up the Fifth Circuit are Louisiana, Mississippi, and Texas. 28 U.S.C. § 41 (2006).

74. *See, e.g.,* *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) (noting that "[t]he Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of 'bad faith' or 'bad conduct'" (quoting *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003))); *see also* *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (noting that "[m]ere negligence is not enough" to warrant an instruction on spoliation); *Riverside Healthcare, Inc. v. Sysco Food Servs. of San Antonio, LP* (*In re* *Riverside Healthcare, Inc.*), 393 B.R. 422, 428 (Bankr. M.D. La. 2008) ("[T]he party accused of destroying the evidence must be shown to have been in bad faith or to have engaged in bad conduct." (citing *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 340 (M.D. La. 2006))).

75. *See* *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000).

76. 337 F.3d 550, 556 (5th Cir. 2003).

77. *See id.*

78. *See, e.g.,* *Global Technovations, Inc. v. Onkyo U.S.A. Corp.* (*In re* *Global Technovations, Inc.*), 431 B.R. 739, 780 (Bankr. E.D. Mich. 2010) (citing *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, No. 06-CV-13143, 2009 WL 998402, at *5 (E.D.

Circuits.⁸² A spoliator who satisfies the bad faith standard for destruction of evidence or for failure to preserve evidence has already acted in a manner unbecoming of the profession and should be sanctioned.

The differing standards among the circuits for imposing spoliation sanctions for discovery misconduct is further illuminated by the fact that several circuits, specifically the First,⁸³ Fourth,⁸⁴ and Ninth⁸⁵ Circuits, do

Mich. Apr. 14, 2009)). The states making up the Sixth Circuit are Kentucky, Michigan, Ohio, and Tennessee. 28 U.S.C. § 41.

79. See, e.g., *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008). The states making up the Seventh Circuit are Illinois, Indiana, and Wisconsin. 28 U.S.C. § 41.

80. See, e.g., *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004). The states comprising the Eighth Circuit are Arkansas, Iowa, Missouri, Nebraska, North Dakota, and South Dakota. 28 U.S.C. § 41.

81. See, e.g., *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997). The states comprising the Tenth Circuit are Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. 28 U.S.C. § 41.

82. See, e.g., *Wylar v. Korean Air Lines Co.*, 928 F.2d 1167, 1174 (D.C. Cir. 1991) (“Mere innuendo . . . does not justify drawing the adverse inference requested . . .”); see also *Moore v. Napolitano*, 723 F. Supp. 2d 167, 169–72 (D.C. Cir. 2010) (discussing on appeal, the imposition of severe sanctions where the court found the defendant’s failure to timely respond to court orders involving electronic document production as evidence of willful conduct sufficient to warrant sanctions). The D.C. Circuit reviews cases on appeal from federal agencies. 28 U.S.C. § 1295 (2013). The Administrative Procedure Act, 5 U.S.C. § 703 (2006), further grants jurisdiction to this circuit to hear cases from other agencies where the agency’s statute does not expressly indicate jurisdiction by the D.C. Circuit.

83. See, e.g., *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (stating that “[c]ertainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.”). The states comprising the First Circuit are Maine, Massachusetts, New Hampshire, and Rhode Island. 28 U.S.C. § 41.

84. See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (discussing dismissal for a party’s failure to preserve evidence relevant to the litigation, noting that dismissal is “usually justified only in circumstances of bad faith”; however, “even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case”). The states comprising the Fourth Circuit are Maryland, North Carolina, South Carolina, Virginia, and West Virginia. 28 U.S.C. § 41.

85. See, e.g., *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1077–78 (N.D. Cal. 2006) (stating that “[t]he court’s inherent authority to impose sanctions for the wrongful destruction of evidence includes the power to exclude evidence that, given the spoliation, would ‘unfairly prejudice an opposing party’” and further noting that “preclusion

not require bad faith on the part of the spoliator but instead require only a finding of extreme prejudice to the party making the accusation of spoliation. Because this approach requires only that the accuser suffer extreme prejudice, it fails to protect the truly innocent. The bad faith approach shows promise and should be adopted by all circuits or at least included in the definition of what constitutes spoliation. The ability to establish bright guidelines for litigants must be grounded in a policy or rule that covers all possibilities. Hence, bad faith or prejudice to the accuser must coexist in any inquiry to determine sanctions by courts. Yet, courts must also be careful not to place a high burden of proof on an accuser who has suffered prejudice at the hands of a spoliator.⁸⁶ Such a burden on an accuser would be at odds with the purpose and punishment nature of spoliation sanctions.⁸⁷

Also, even between the state courts, there is another level of divide when determining spoliation sanctions. Some states have held that spoliation of evidence gives rise to a tort action based on intentional interference with prospective civil action.⁸⁸ Yet, the majority of states find no separate common law tort action for spoliation of evidence.⁸⁹

The duty to preserve is often not clear and can be complicated and quite hard to institute.⁹⁰ Regardless of this fact, “the duty to preserve potential evidence is essential to the courts’ truth-seeking function.”⁹¹ Courts admonish that the duty to preserve is set in motion when a party reasonably anticipates litigation.⁹² Therefore, to determine if the duty

sanctions . . . depend[] on the extent to which plaintiffs were prejudiced” (quoting *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992)). The states comprising the Ninth Circuit are Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. 28 U.S.C. § 41.

86. See *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998) (stating that once a party has suffered prejudice at the hand of a spoliator, courts must not hold “the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence” because such an action “would subvert the prophylactic and punitive purposes” of spoliation sanctions).

87. *Id.*

88. *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986).

89. See, e.g., *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998) (disapproving prior cases and holding that no tort remedy exists “for the intentional spoliation of evidence by a party” if the party knew or had reason to know about the spoliation before the start of trial or before other court decisions on the merits of the action).

90. See Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 188 (2006) (stating that preservation issues and the resulting spoliation problems are “the most vexing issues in electronic discovery”).

91. *Id.* at 189.

92. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003); see also *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (discussing the duty to

was or has been triggered, courts have to examine and assess each case differently because case facts are not the same.⁹³ To further add to the confusion, courts delve into discovering exactly which parties were aware of the possibility that litigation was probable.⁹⁴ Thus, at two stages of the litigation process, courts have to determine when the preservation duty attached—at the earliest onset of litigation and then again once a motion for spoliation is made.⁹⁵ Further, in today's e-discovery climate, judges are intricately involved in setting threshold rules to deal with e-discovery because of the growing number of cases dealing with preservation in e-discovery cases.⁹⁶ Prior to the electronic age, this had not been the case.⁹⁷

During the first ten months of 2010, of eighty-four e-discovery cases reviewed, thirty-nine percent dealt with sanctions, and of that percentage, forty-nine percent involved preservation and spoliation issues.⁹⁸ When courts have to engage in such detailed fact-finding in order to determine if preservation duties have been breached, it adds a different tone to the litigation process. Such a process does little to assuage the fears of litigants embroiled in e-discovery battles and the ensuing possible repercussions.

preserve once litigants knew or should have known that subject information may be relevant to future litigation).

93. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

94. See *Zubulake*, 220 F.R.D. at 217.

95. Withers, *supra* note 90, at 189.

96. See Craig Ball, *Piecing Together the E-Discovery Plan*, TRIAL, June 2008, at 20, 22 n.3 (“[S]even states have adopted e-discovery rules hewing closely to the federal rules (Arizona, Indiana, Louisiana, Minnesota, Montana, New Jersey, and Utah); another 14 states are considering changes to their court rules to address e-discovery.”). These fourteen states are Alaska, Connecticut, Florida, Illinois, Iowa, Kansas, Maryland, Nebraska, New Mexico, North Dakota, Ohio, Tennessee, Virginia, and Washington. Brett Burney, *Mining E-Discovery Stateside*, LAW TECH. NEWS (Jan. 18, 2008), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1200594602161>.

97. Ball, *supra* note 96, at 28 (“[T]he meet-and-confer process is likely to endure and grow within federal and state procedure.”).

98. *Year In Review: Kroll Ontrack 2010 Discovery Trend Data Reveals Organizations Struggle with Preservation, Production and General Discovery Protocols*, KROLL ONTRACK (Dec. 7, 2010), <http://www.krollontrack.com/company/news-releases/?getPressRelease=61500> [hereinafter KROLL ONTRACK]. Kroll Ontrack is a technology firm specializing in consulting, products, and service solutions in the areas of data recovery, paper and electronic discovery, document review, computer forensics, secure information, and ESI. *Id.*

Because these “e-battles”⁹⁹ take place prior to the merits of a case, interference or delay to the main case is always at stake.¹⁰⁰

Courts differ as to when sanctions should apply because the standards used by different courts vary. Some are of the opinion that sanctions should apply only if an accuser can prove documents existed and that such documents were destroyed due to the spoliating party’s failure to preserve the documents.¹⁰¹ Cases where accusers can prove that relevant documents existed and spoliators failed to produce such documents lend support to the belief that something other than possible bad conduct must be the impetus behind a court’s decision to impose sanctions.¹⁰² Therefore, just because information is destroyed, there should be no automatic guarantee of sanctions.¹⁰³ To invoke sanctions after the loss of ESI, at a minimum, the lost information must be shown to be relevant to the issues involved in the case.¹⁰⁴

The Supreme Court has mandated that terminating sanctions or default sanctions should be hinged on “willfulness, bad faith, or any fault” of a party and should not apply where the failure to comply is based on an inability to comply.¹⁰⁵ For courts that follow this methodology, the burden of proof rests squarely on the accuser.¹⁰⁶ Further, our legal system dictates that accusers must prove their case against the accused.¹⁰⁷ But in

99. The Author uses this term to describe the prelitigation meetings and hearings now required to resolve e-discovery issues.

100. See *Eon-Net LP v. Flagstar Bancorp.*, 653 F.3d 1314, 1317 (Fed. Cir. 2011) (affirming the lower court’s decision to award attorneys’ fees of almost \$500,000 for misconduct regarding the failure to preserve documents, among other things).

101. See *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 439 (S.D.N.Y. 2010).

102. See *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 183, 198–99 (S.D.N.Y. 2007) (discussing sanctions for a spoliator who admitted that relevant documents no longer existed where the accuser, a former employee, had requested copies of his e-mails before leaving his employment and produced many relevant e-mails that the defendants failed to produce); H. Christopher Boehning & Daniel J. Toal, *Six Hard-Learned Lessons About EDD*, LAW TECH. NEWS (Mar. 2, 2007), http://www.law.com/jsp/article.jsp?id=900005553831&Six_HardLearned_Lessons_About_EDD&slreturn=20130431174239.

103. *Orbit One Commc’ns*, 271 F.R.D. at 438 (discussing the importance of relevance in applying sanctions for electronic information lost during the pendency of a suit).

104. See *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 109 (2d Cir. 2001); *Orbit One Commc’ns*, 271 F.R.D. at 438.

105. *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 640 (1976) (per curiam) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958)).

106. See *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at *13–17 (S.D. Fla. Nov. 16, 2009) (stating that parties must establish that “evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case” where no direct evidence of bad intent exists).

107. See *id.* at *16–17.

e-discovery cases, this becomes a tough burden because in order for an accuser to prove the existence or nonexistence of documents, the accuser must have either made copies of the destroyed documents or somehow heard from others of a document's existence.¹⁰⁸ Such a tough burden may end up working against an accuser's favor—thwarting the purpose of the e-discovery process.

Some courts use FRCP 26¹⁰⁹ as the governing standard when dealing with the duty to preserve electronic evidence. These courts apply a broad standard for disclosure and discovery of evidence.¹¹⁰ Generally, “[b]road discovery is [the] cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure.”¹¹¹ These rules are accorded broad treatment to engender the “[m]utual knowledge of all . . . relevant facts,” thereby allowing parties to flesh out their claims with minimal burden.¹¹² This approach, though admirable in its essence, still fails to give litigants direction in their quest to avoid sanctions for EDD violations. Therefore, once again courts will have to find a way to keep litigants on the straight and narrow regarding e-discovery protocols. These protocols would factor in when e-discovery violations are not so blatant. Most courts easily handle blatant e-discovery violations.¹¹³

Courts seem to be moving toward the direction of using EDD sanctions as a sword and a shield. Rule 37 already provides a host of sanctions courts can use when parties fail to obey their orders.¹¹⁴ Once a party fails to

108. See *Sampson v. City of Cambridge*, 251 F.R.D. 172, 183 (D. Md. 2008) (holding that where the plaintiff was unable to establish that “access to [the defendant’s] emails would have produced evidence which a reasonable factfinder could conclude supported her claims,” the court must deny the plaintiff’s sanction motion against the defendant).

109. FED. R. CIV. P. 26.

110. See *id.* 26(b)(1); see also *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 433 (S.D.N.Y. 2009) (discussing the broad discovery standard that includes any evidence “reasonably calculated to lead to the discovery of admissible evidence” (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991))).

111. *Jones v. Goord*, No. 95 CIV. 8026(GEL), 2002 WL 1007614, at *1 (S.D.N.Y. May 16, 2002).

112. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

113. See, e.g., *S. New England Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82, 92, 96 (D. Conn. 2008) (finding that “wiping” software used on an employee’s computer warranted default judgment because the court found the behavior intentional, done in bad faith, and sufficient to support an inference that the evidence was destroyed because it was harmful to the destroying party).

114. See FED. R. CIV. P. 37(b)(2)(A). Rule 37 offers a list of possible sanctions for failure of a party to obey a court order. This list includes striking a pleading in whole or in part, dismissing the action or proceeding in whole or in part, and rendering default

obey a court's production order, the court, under Rule 37(b) and its own inherent power, can sanction the offending party.¹¹⁵ When cases involving EDD are at issue and the conduct of litigants during production of EDD is so egregious, courts will mete out sanctions in a prohibitive manner.¹¹⁶ Yet, even when awarding termination sanctions, courts will still weigh the likelihood of errant conduct of litigants in determining whether to grant dismissal sanctions.¹¹⁷ Courts use factors that are evaluated against conduct of offending litigants.¹¹⁸ Further, courts will use sanctions not only to punish uncooperative offenders but also to send a chilling message of deterrence to possible future offenders.¹¹⁹ This chilling message is being heard loud and clear by potential litigants. Because lawyers abhor the unknown, the dread and angst surrounding the e-discovery process is palpable.¹²⁰ Hence, there is a need for a better mechanism or procedure to help assuage litigants' fears. A single uniform or predictable standard must be adopted. The five factors courts have annunciated to determine dismissal can easily be used to determine e-discovery sanctions.¹²¹ The factors are well known by all courts and would require only application to the specific

judgment against the disobedient party. *Id.* However, the listed sanctions are not exhaustive and act as suggestions, as the rule states that sanctions "may" include. *Id.* Thus, courts have broad discretion in awarding sanctions.

115. FED. R. CIV. P. 37(b); *see also* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (stating that "[t]he authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's own inherent powers").

116. *See, e.g.,* Lee v. Max Int'l, LLC, 638 F.3d 1318, 1319 (10th Cir. 2011) (discussing the ultimate punishment of dismissal of the plaintiffs' suit, with prejudice, by the district court for the plaintiffs' repeated failure to comply with the defendant's request for production and for the plaintiffs' failure to comply with two court orders requesting the plaintiffs to produce discovery documents).

117. *See* Ehrenhaus v. Reynolds, 965 F.2d 916, 921–22 (10th Cir. 1992).

118. *Id.* at 921 (discussing the factors courts utilize in determining whether to dismiss a case). The factors to be considered are "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant"; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Id.* (citations omitted) (quoting Ocelot Oil Corp. v. Sparrow Indus., 847 F.3d 1458, 1465 (10th Cir. 1988)).

119. *See* DL v. District of Columbia, 274 F.R.D. 320, 321–22 (D. D.C. 2011) (discussing defendants who repeatedly failed to abide by court orders concerning their production obligation, which prompted the court to grant the plaintiffs' motion to compel and note that the defendants' conduct was so flagrant that "[a] discovery violation of this exotic magnitude is literally unheard of in this Court").

120. *See* Gina Passarella, *Lawyers Struggle To Get a Grasp on E-Discovery*, LAW TECH. NEWS (Aug. 10, 2011), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202510650344&Lawyers_Struggle_to_Get_a_Grasp_on_EDiscovery.

121. *See* Ehrenhaus, 965 F.2d at 921–22.

e-discovery dispute before the court. This way, litigants know ahead of time what they are up against.

IV. IMPLICATIONS OR CONSEQUENCES OF INDISTINCT SANCTIONS

When courts fail to give clear guidelines regarding ESI and fail to give adequate notice to litigants about what is and what is not sanctionable conduct, the practice of law takes on a landmine-like quality. Often, as the chasm between the competing interests of the bench and the bar grows—the bench ensuring broad discovery versus the litigant’s interest in ensuring that the astounding cost of e-discovery is controlled—the fundamental worth of litigation is rapidly being undermined.¹²² Accordingly, e-discovery costs in litigation can account for fifty to eighty percent of litigation costs.¹²³ This is quite understandable when it is estimated that over ninety percent of information is created in an electronic format.¹²⁴ Therefore, looking at the enormity, vastness, and various forms of electronic information makes it easy to see the complexities and exorbitant costs involved in e-discovery litigation.¹²⁵ These costs represent a growing strain on all players in the litigation process—companies, law firms, solo attorneys, and ultimately clients.¹²⁶ The e-discovery battle will become even more calamitous as newer ways to efficiently store and retrieve information are reached.¹²⁷ No sector of litigation is exempt. Even government agencies are faced with the burgeoning costs of e-discovery.¹²⁸

The electronic age has afforded other professions noteworthy advancements in terms of storage capacities and retrieval of information,

122. Passarella, *supra* note 120.

123. *Id.*

124. THE SEDONA CONFERENCE WORKING GRP. ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (2005), available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>; Steven C. Bennett & Cecilia R. Dickson, *E-Discovery May Be a Job for Special Masters: They Might Show a Way Around the Complexities Inherent in the Process*, NAT’L L.J., July 17, 2006, at S5.

125. See Mazza et al., *supra* note 1, ¶¶ 2–6.

126. See Stanley M. Gibson, *Hit ‘Delete’ To Prevent EDD Disaster*, CORP. COUNS. (Aug. 7, 2007), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=900005488122&Hit_Delete_to_Prevent_EDD_Disaster.

127. See Passarella, *supra* note 120.

128. Jason Krause, *Government Agencies Look Within To Solve E-Discovery Woes*, CORP. COUNS. (Aug. 15, 2011), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202511327606&Government_Agencies_Look_Within_to_Solve_EDiscovery_Woes.

as well as the ability to keep records easily accessible for future use.¹²⁹ These same advancements have been an advantage as well as an Achilles' heel¹³⁰ to the practice of law where e-discovery plays a factor.¹³¹ Prior to the advent of the electronic age, litigation was about getting to the truth. Prior to the electronic age, the truth was obtained using paper documents to satisfy discovery requests where each party, in accordance with civil procedure rules, essentially bore its own cost of producing responsive documents.¹³² However, in today's electronic age, truth, as far as discovery is concerned, has become a moving target. "[D]iscovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter."¹³³ As many opined, e-discovery has given rise to previously unseen costs and burdens, which were new to traditional discovery.¹³⁴ Thus, "the greatest weakness of the US court system is its expense. And the driving factor for that expense is discovery excesses."¹³⁵ As a result, "[the] courts are in danger already of becoming an intolerably expensive way to protect innovation or prove freedom to operate."¹³⁶ Thus, adding to the already prohibitive costs, when courts sanction parties and there are no clear-cut guidelines as to what or when actions are sanctionable, litigants are open to unforeseen consequences during the pendency of the suit. Many organizations do not have clear information management and discovery protocols.¹³⁷ As a result, organizations become reliant on case law that can change drastically or be incongruous depending on the jurisdiction.¹³⁸

129. Kenneth J. Withers, *The Real Cost of Virtual Discovery*, FED. DISCOVERY NEWS, Feb. 2001, at 3, 3.

130. From Greek mythology, Achilles was a Greek war hero believed to have been dipped in the River Styx as a child and made invulnerable. Every part of his body except his heel was submerged in the river. He was killed during the Trojan War by an arrow that fatally pierced his heel—his only weak spot.

131. Withers, *supra* note 129, at 3.

132. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (discussing the role of the court in determining a party's burden when cost shifting is at issue because of a party's duty to comply with court orders).

133. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (quoting *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)) (internal quotation marks omitted).

134. See, e.g., Redish, *supra* note 4, at 561.

135. Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Fed. Circuit, Speech at the Fifteenth Annual Eastern District of Texas Bench and Bar Conference: The State of Patent Litigation (Sept. 27, 2011), in 21 FED. CIR. B.J. 331, 336 (2012).

136. *Id.* at 337.

137. KROLL ONTRACK, *supra* note 98 (quoting Michele Lange, director of discovery for Kroll Ontrack).

138. *Id.*

Attorneys are fearful and apprehensive of e-discovery.¹³⁹ This fear stems from popular belief that lawsuits involving e-discovery can quickly end in settlement, once one side requests production of electronic documents.¹⁴⁰ Sanctions on parties who fail to properly handle ESI are well known by litigants.¹⁴¹ Courts are imposing sanctions for spoliation of evidence as well as for late production of evidence.¹⁴² Plus, revenue from e-discovery markets is at an all-time high and is expected to continue to grow.¹⁴³ Profits for e-discovery markets are growing in large part because litigants are spending on e-discovery vendors to ensure protection from sanctions.¹⁴⁴ When litigation costs escalate due to sanctions, or even the possibility or threat of sanctions, a bleak picture emerges wielding a substantial blow to the U.S. litigation process.¹⁴⁵ A party's duty regarding the avoidance of sanctions must be clear. It is the responsibility of courts to provide the clarity.¹⁴⁶

Although the e-discovery rules were added to address the change from paper discovery to e-discovery, the change has had the effect of slowing down the litigation process and is squarely at odds with the goal that the drafters had in mind when proposing FRCP 1.¹⁴⁷ If the drafters were originally concerned about a speedy litigation process, they would have never imagined the degree to which the electronic age has bogged down the process once again.¹⁴⁸ In true litigation fashion, both sides of the aisle

139. Passarella, *supra* note 120.

140. See Redish, *supra* note 4, at 601–02.

141. Fort, *supra* note 54.

142. *Id.*

143. See Evan Koblenz, *E-Discovery Market Predicted To Reach \$1.5B in 2013*, LAW TECH. NEWS (May 23, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202494788349>.

144. See *id.*

145. Anga, *supra* note 24, at 15.

146. See Mark Michels, *The Story Behind Delaware's Default E-Discovery Standard*, LAW TECH. NEWS (Jan. 24, 2012), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202539401259&The_Story_Behind_Delawares_Default_EDiscovery_Standard (discussing how Delaware has been at the helm of e-discovery guidelines in that the courts there have developed a default e-discovery standard that covers ESI).

147. FED. R. CIV. P. 1 (language amended 2007). The drafters had envisaged that the rule would help guarantee “the just, speedy and inexpensive determination of every action.” *Id.*

148. See Kevin A. Griffiths, Comment, *The Expense of Uncertainty: How a Lack of Clear E-Discovery Standards Put Attorneys and Clients in Jeopardy*, 45 IDAHO L. REV. 441, 442 (2009) (discussing the practical and financial burdens ESI creates in the practice of law).

blame the other side for the problem. On the one hand, defense attorneys believe that plaintiffs, knowing that large firms have large amounts of electronic documents, use this knowledge to press to their advantage settlement of the dispute.¹⁴⁹ On the other hand, plaintiff attorneys feel that defense attorneys have the advantage because they get to decide or regulate search term variants during meet and confer¹⁵⁰ Rule 26¹⁵¹ conference meetings.¹⁵²

To further compound matters, electronic information has many forms.¹⁵³ Because electronic information can be produced in different forms, disputes often involve litigation diversionary games, with each party seeking to lessen its discovery responsibilities while simultaneously setting up e-discovery road blocks for opposing counsel.¹⁵⁴ Litigation diversionary games have led to increased discovery motions and “overreaching, obstruction and extensive, but unproductive discovery disputes in some cases precluding adjudication on the merits altogether.”¹⁵⁵ When discovery disputes are so drawn out and out of control, it makes it difficult to bring traditional cases to court.¹⁵⁶ Instead, parties may simply decide to settle or decide not to pursue litigation at all due to expense.¹⁵⁷ Regardless of what each side believes or does, one thing is sure: cases involving motions to compel discovery and motions for sanctions are quickly becoming sanction battles,¹⁵⁸ with each side using e-discovery as a tactical weapon,¹⁵⁹ which was rare prior to the advent of e-discovery. In such battles, judges are forced to engage in and sort out e-discovery issues between parties.¹⁶⁰

149. Passarella, *supra* note 120.

150. See FED. R. CIV. P. 26(f); see also THE SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 21 (2d ed. 2007), available at http://www.sos.mt.gov/Records/committees/erim_resources/A%20-%20Sedona%20Principles%20Second%20Edition.pdf (discussing the requirements of FRCP 26(f) and associated issues).

151. FED. R. CIV. P. 26(f)(1), (3)(C) (requiring litigants to start conferencing in the early stages of litigation when e-discovery is involved).

152. See Passarella, *supra* note 120.

153. Withers, *supra* note 90, at 186.

154. *Id.*

155. Cecil Lynn III & Alexandra Hicks, *E-Discovery Rulings: 2008 in Review*, LAW.COM (Jan. 9 2009), http://www.law.com/jsp/article.jsp?id=1202427363555&EDiscovery_Rulings_2008_in_Review (emphasis omitted) (quoting *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 360 (D. Md. 2008)).

156. Martha Neil, *OK, Discovery's a Problem, But What Can Be Done About It?*, A.B.A. J. (Sept. 11, 2008, 1:30 PM), http://www.abajournal.com/news/article/ok_discovery_a_problem_but_what_can_be_done_about_it.

157. *Id.*

158. Bennett & Dickson, *supra* note 124, at S5.

159. Rader, *supra* note 135, at 336.

160. Bennett & Dickson, *supra* note 124, at S5.

Increased judicial involvement in discovery matters forces courts to become involved in time-wasting minute details of capacious e-discovery collections.¹⁶¹ Each case involving e-discovery and ensuing sanctions is clearly different.¹⁶² As a result, sanction rulings have failed to give potential litigants adequate warning of sanctionable conduct beyond the widely known and quoted seminal cases because states and circuits are divided by their own definitions of what constitutes sanctionable conduct.¹⁶³

These divisions—different approaches—have resulted in forum shopping, another consequence of indistinct sanctions for e-discovery violations. The varying standards among different circuits will engender opportunistic approaches to case filing. For example, the Eleventh Circuit noted, during a motion to determine sanctions, the different standards required for a spoliation finding in the different circuits.¹⁶⁴ Additionally, the court opined that had the matter been in another circuit, the results may have been different.¹⁶⁵ Courts, litigants, and their attorneys are aware of the different circuit approaches to sanctions.¹⁶⁶ The different standards

161. *Id.*

162. *See, e.g.,* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 222 (S.D.N.Y. 2003) (finding that the party that destroyed e-mails must bear the other party's cost of redepositing witnesses for the purpose of inquiring into the issues raised by the destroyed e-mails); Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 103–05 (D. Md. 2003) (holding that sanctions were appropriate where a party failed to produce responsive e-mail records until long after the discovery cut-off date); Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. CA 03-5045 AI, 2005 WL 674885, at *5 (Fla. Cir. Ct. Mar. 23, 2005) (finding deliberate the withholding of discovery and fraudulent assurances to the court and opposing counsel about the completeness of productions).

163. Spencer, *supra* note 21, at 2005–06 (arguing that preservation obligations are different in the states and circuits because regulating prelitigation preservation is done through the court's inherent power, resulting in inconsistent sanction determinations by courts).

164. Point Blank Solutions, Inc. v. Toyobo Am., Inc., No. 09-61166-CIV, 2011 WL 1456029, at *1 (S.D. Fla. Apr. 5, 2011) (discussing the standard for a finding granting adverse inference jury instructions as a sanction for failure to produce deleted e-mails).

165. *Id.* The court denied the motion to determine spoliation of evidence and appropriate sanctions because the defendants were under a duty to others—and not Point Blank Solutions—to preserve evidence, and the parties that the defendants were under a duty to preserve evidence for were not parties to the current litigation. *Id.*

166. *See* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593 (4th Cir. 2001) (noting that dismissal is “usually justified only in circumstances of bad faith But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.”); Sacramona v. Bridgestone/Firestone, Inc., 106 F.3d 444, 447 (1st Cir. 1997) (“Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct

and the problem of determining sanctions are further illustrated in the Third Circuit, where a split exists within the circuit itself regarding what constitutes actual suppression by a spoliator.¹⁶⁷ Thus, in New Jersey, where evidence is negligently destroyed, a court may grant an adverse inference sanction,¹⁶⁸ while in the Middle District of Pennsylvania, intentional conduct is required for the imposition of sanctions.¹⁶⁹ Finally, in the Eastern District of Pennsylvania, a spoliator's conduct must be willful or fraudulent to merit sanctions.¹⁷⁰ For litigants, the import of this circuit split will be determined on where the suit is filed in the circuit.¹⁷¹

V. IS PRESERVATION THE CULPRIT?

Scholars postulate that spoliation involving electronic evidence must be handled differently from traditional spoliation issues.¹⁷² These arguments suggest that the expense and burden of e-discovery is so different in degree and magnitude from paper discovery that the judiciary must develop new or different standards to combat the problem.¹⁷³ Others argue that the problem of sanctions for e-discovery violations arises from the different preservation requirements determined by courts.¹⁷⁴ However, even in the face of pending litigation, no court will require a litigant to retain each and every single piece of paper or every document in electronic or paper form or store every kind of backup tape that may

resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.”).

167. *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, No. 05-4896 (PGS), 2008 WL 4513696, at *4 (D. N.J. Oct. 1, 2008) (stating that some courts require a showing of intentional conduct before giving an adverse inference instruction, whereas other courts require only a showing of negligence).

168. *Paris Bus. Prods., Inc. v. Genesis Techs., LLC*, No. 07-0260 (JBS), 2007 WL 3125184, at *3 (D. N.J. Oct. 24, 2007) (quoting *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D. N.J. 2004)).

169. *Paluch v. Dawson*, No. 1:CV-06-01751, 2008 WL 2785638, at *8, *13 (M.D. Pa. July 17, 2008) (directing the defendants to provide additional information but overall finding that they largely complied in good faith with the discovery requests).

170. *Miles v. Elliot*, No. 94 4669, 2011 WL 857320, at *5 (E.D. Pa. Mar. 10, 2011).

171. *See Arteria Prop.*, 2008 WL 4513696, at *4 (“[D]istrict courts within the Third Circuit are split regarding the showing necessary to satisfy the ‘actual suppression’ requirement. Some have found that an adverse inference arises when spoliation ‘was intentional, and indicates fraud and a desire to suppress the truth, and . . . not . . . where the destruction was a matter of routine with no fraudulent intent.’”).

172. *Redish*, *supra* note 4, at 592.

173. *Id.*

174. *See Spencer*, *supra* note 21, at 2006–08.

be relevant.¹⁷⁵ Courts recognize that this would be a foolhardy approach to the preservation problem.¹⁷⁶ The standard courts want litigants to follow is that parties should preserve documents that are inimitable and germane to the lawsuit.¹⁷⁷ In other words, relevant information that parties know would be harmful to them, yet useful to an adversary, must be retained.¹⁷⁸ The duty to preserve in its broadest sense covers all relevant information.¹⁷⁹ Preservation duties attach to information that is in existence at the time litigation is anticipated and extend to any information created afterward that is relevant to the lawsuit.¹⁸⁰ So, the duty to preserve may not really be the issue.¹⁸¹ Rather it is a party's failure to act or not to act and the manner in which such failure or inaction occurred that are the real culprits because parties have always had to preserve evidence that is relevant to a lawsuit.¹⁸² What is evident is that all parties should be reluctant to destroy data because such an act could have dire consequences later.¹⁸³ However, judging by the growth in e-discovery sanction requests but the stagnant number of court-awarded sanctions,¹⁸⁴ parties may prefer to destroy data and take a chance on not getting caught.

Most of the criticism of the duty to preserve concerns the attendant costs of implementing the duty and the failure of courts to shift costs of

175. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no.’”).

176. *Id.*

177. See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003).

178. *Zubulake*, 220 F.R.D. at 217 (stating that the duty to preserve attaches to “anyone who anticipates being a party or is a party to a lawsuit” and such party “must not destroy unique, relevant evidence that might be useful to an adversary”).

179. *Id.* at 218 (“[I]nformation that is relevant to the claims or defenses of any party, or which is ‘relevant to the subject matter involved in the action’” must be preserved. (quoting FED. R. CIV. P. 26(b)(1))).

180. *Id.*

181. See *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 175–76 (S.D.N.Y. 2004) (“[I]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction.”).

182. See *id.* at 176.

183. Hardaway et al., *supra* note 13, at 578.

184. 2011 Mid-Year E-Discovery Update, GIBSON DUNN (July 22, 2011), <http://www.gibsondunn.com/publications/pages/2011Mid-YearE-DiscoveryUpdate.aspx> (noting that the number of sanction requests in 2011 was higher than requests made during the same period of 2010).

production to the requesting party.¹⁸⁵ Traditionally, each party bore its own cost of production during litigation.¹⁸⁶ The electronic age has changed this. Now, more than ever, the cost burden on the producing party is much more because of the sheer volume of ESI, the inaccessibility of ESI, and the custodianship issues associated with ESI.¹⁸⁷ The problem is even more dubious when one party is clearly not financially equal to the other party.¹⁸⁸ This was the case in *Zubulake v. UBS Warburg LLC*. If Zubulake had been forced to pay the costs of producing relevant e-mails from UBS Warburg, the litigation may have terminated without ever getting to the merits of the case.¹⁸⁹

The current standard for preservation and the subsequent finding of spoliation require all parties to be proactive in litigation preparation.¹⁹⁰ Requiring parties to begin preservation as soon as they know litigation is imminent is the best possible standard.¹⁹¹ This requirement gives guidance by providing litigants a starting point for action in document preservation.¹⁹² The current preservation standard courts use is not perfect because in many instances there is no one-size-fits-all in cases involving preservation.¹⁹³ Also, depending on the size of the participants in the litigation, the duty to preserve may cripple any attempt to have an elimination process for data.¹⁹⁴ However, considering the circumstances created by the electronic

185. See Mazza et al., *supra* note 1, ¶ 98 (“Cost-shifting battles are hotly contested and for good reason: decisions on motions regarding who will be required to pay for discovery responses (the cost of which may run into the hundreds of thousands, if not tens of millions, of dollars) can impact severely how an action proceeds and in fact may be outcome-determinative in some cases.”).

186. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

187. Withers, *supra* note 90, at 182.

188. See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003). This was a seminal employment discrimination case where the court noted that attempting to come up with a test encompassing Rule 26(b)(1) and 26(b)(2) often caused the party requesting the discovery to be responsible for the cost of production. *Id.* at 311, 316.

189. See *id.* at 311–12.

190. *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (“A failure to preserve documents and records, once the duty to do so has been triggered, raises the issue of spoliation of evidence.”).

191. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010).

192. See *id.*

193. See Spencer, *supra* note 21, at 2031. Professor Spencer points out that the appropriate sanction in different circumstances will be considered on a “case-by-case basis” by judges. *Id.*

194. Hardaway et al., *supra* note 13, at 578.

age—the swiftness of creating documents and the swiftness of destroying documents¹⁹⁵—this standard, for now, is good enough.

Courts have always had to go back in time to ferret out the start of litigants' egregious or negligent conduct.¹⁹⁶ Courts examine the facts of a case to determine misconduct after the events have occurred.¹⁹⁷ Courts make a "judgment call . . . by . . . reviewing . . . conduct through the backward lens known as hindsight."¹⁹⁸ In other words, sanctions are determined by courts "in light of the full record in the case."¹⁹⁹ Because courts use the same methodology to determine discovery misconduct, whether it concerns electronic or paper discovery, pinpointing a time when parties should begin to preserve documents will have to be based on the specific situation before the court.²⁰⁰

VI. CONCLUSION

All parties to the lawsuit should take a proactive approach to the preservation of relevant electronic documents. Just as a party's holding of relevant documents must institute litigation hold letters,²⁰¹ a party initiating a lawsuit should also be required to be proactive by serving a notice of litigation letter on prospective defendants.²⁰² Prospective

195. See generally Cameron G. Shilling, *Electronic Discovery: Litigation Crashes into the Digital Age*, 22 LAB. LAW. 207, 209–10 (2006) (discussing the effect of electronic data on discovery and problems associated with its deletion).

196. See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 102–05 (2d Cir. 2002) (producing a timeline that documented discovery behavior by Residential Funding Corporation, which was the basis of an adverse inference motion).

197. See, e.g., *id.*

198. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010).

199. See, e.g., *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979) (stating that the plaintiff, through its own fault, had stopped the discovery phase of the litigation for almost four years) (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)).

200. See *Residential Funding Corp.*, 306 F.3d at 105–06 (reviewing case-specific details to rule on a motion for sanctions).

201. A litigation hold letter requires parties engaged in litigation to retain relevant—including potentially relevant—documents and immediately "suspend the automatic deletion of e-mails and the writing over of backup tapes" that may be pertinent to the litigation process. Patricia A. Bronte, *Managing Electronic Discovery Successfully in Insurance Coverage Litigation*, in *INSURANCE COVERAGE 2007: CLAIM TRENDS & LITIGATION* 55, 63 (2007).

202. Compare *Frey v. Gainey Transp. Servs., Inc.*, No. 1:05-CV-1493-JOF, 2006 WL 2443787, at *9 (N.D. Ga. Aug. 22, 2006) ("The legal system does not permit

plaintiffs should send out the notice of litigation letter, particularly to those defendants known to have large amounts of electronic information.²⁰³ The notice letters must not be vague but must be specific in form and substance to warn a litigant of impending suit.²⁰⁴ Such notice would allow a defendant adequate time to begin to preserve responsive documents during the time frame that forms the basis of the suit.²⁰⁵ Parties would have an early start on locating and preserving relevant information.

However, the notice of litigation letter does not remove a defendant's duty to preserve relevant information where the defendant is put on notice of pending litigation prior to receipt of the notice of litigation letter.²⁰⁶ Conversely, a simple dispute or disagreement, and nothing else, is insufficient to put a defendant on notice that litigation is imminent.²⁰⁷ Putting more of the onus on the plaintiffs, by requiring them to act timely, could help to level the litigation playing field. This Author believes that plaintiffs should minimally include the following factors in their notice letters: (1) the cause of action; (2) the date giving rise to the cause of action;

discovery to begin in a lawsuit until after a party has been served with a complaint and answered, so it is difficult to allow a potential plaintiff to make an end run around the Federal Rules of Civil Procedure by filing a preemptive 'spoliation' letter."), *with* *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 340–42 (M.D. La. 2006) (holding that a demand letter sent by the purchaser of a processing plant to a vendor should have reasonably alerted the purchaser to anticipate litigation with the vendor, thereby triggering the purchaser's duty to preserve evidence). In *Alcoa*, this was the first time the Fifth Circuit addressed the standards of preservation of electronic evidence and applicable sanctions where evidence had been spoliated. 244 F.R.D. at 339.

203. See, e.g., SHARON D. NELSON ET AL., *THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK: FORMS, CHECKLISTS, AND GUIDELINES* 87–89 (2006) (showing examples of preservation of evidence letters sent out to opposing counsel and third parties prior to litigation).

204. See *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (pointing out that "[i]t may be that a letter that merely identifies a dispute but expresses an invitation to discuss it or otherwise negotiate does not trigger the duty to preserve evidence").

205. See *Wisniewski v. PACOA LLC*, No. 017131/09, 2011 WL 1205464, at *5 (N.Y. Sup. Ct. Mar. 31, 2011) (holding that letter sent to the defendant by the plaintiff's former counsel was insufficient to "establish any requisite 'notice to preserve' evidence relating to a potential lawsuit" because it did not specifically request that the defendant preserve evidence relating to the date of the accident at issue).

206. See *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, No. 05-CV-70404-DT, 2006 WL 3759914, at *5 (E.D. Mich. Dec. 20, 2006) (holding that the defendant "was on notice of the potential of litigation" when it received a letter from the plaintiff informing the defendant to expect communication from the plaintiff's attorney); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216–17 (S.D.N.Y. 2003) (holding that the duty to preserve arose before the suit was filed because employees of the defendant who were associated with the plaintiff recognized the possibility that the plaintiff would file suit).

207. See, e.g., *Goodman*, 632 F. Supp. 2d at 510 ("The mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.").

(3) the date when suit is expected to be filed; (4) the court where the action would be filed; (5) what kind of information should be preserved or retained; and (6) the crucial factual time periods the plaintiff believes would encompass relevant documents needed from the defendant for the litigation.²⁰⁸ The level of specificity of the notice letter, in terms of what should be preserved, will depend on the case.²⁰⁹ Further, problems may arise when sending notice of litigation letters. For instance, if the notice of litigation letter lists specific items to be preserved, then a defendant may be able to avoid sanctions where there is a failure to preserve items not specifically listed.²¹⁰ However, many problems of this nature can be resolved if the notice letter contains basic contract or statutory language such as “including but not limited to” or “all other” information that may be relevant to the lawsuit.²¹¹ Language used in notice letters must be specifically drafted to contain sufficient detail and description so as not to be found too broad by the courts.²¹² These catchall phrases will place the producing party on notice that further production and preservation of relevant documents may still be needed.

Court sanctions for e-discovery violations are on the rise.²¹³ The threat of sanctions for e-discovery violations may spur reactions formerly unheard of in litigation. For instance, insurance companies are offering extended

208. *Contra* Thompson v. U.S. Dep’t of Hous. & Urban Dev., 219 F.R.D. 93, 100 (D. Md. 2003) (discussing the plaintiff’s role in alerting an adversary of the duty to preserve: “While a litigant certainly may request that an adversary agree to preserve electronic records during the pendency of a case, or even seek a court order directing that this happen, it is not required” (footnote omitted)).

209. *See* Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1287 (M.D. Fla. 2009) (finding that the defendants were not on notice to preserve evidence pivotal to the litigation because “[n]either preservation letter and no other notice to Defendants suggested that the uniforms should be preserved”).

210. *Id.* (stating that because the defendants were not on notice to preserve the uniforms, jury instructions regarding the destruction of the uniforms were not warranted).

211. *See, e.g.,* Computek Computer & Office Supplies, Inc. v. Walton, 156 S.W.3d 217, 220, 223 (Tex. App. 2005) (noting that the trial court ordered an injunction to stop the defendants from “removing or destroying any files, or copies of files, including but not limited to Defendants’ computer or computer files” (internal quotation marks omitted)). The appellate court later found that the language was too broad because it did not specifically refer to the defendants’ business activities in relation to the plaintiff. *Id.* at 223. The appellate court modified the injunction to apply to information that related to the plaintiff. *Id.* at 224.

212. *See id.* at 223.

213. Rachel M. Zahorsky, *Policy Matter: Firm Plans Insurance Against Evidence Loss*, A.B.A. J., Mar. 2011, at 31, 32.

coverage policies in anticipation of spoliation tort claims to protect customers who are in the business of acting as custodians of property that is part of a case controversy.²¹⁴ This same type of coverage may be considered for e-discovery violations that give rise to sanctions. Such spoliation insurance coverage would not be determinative to the question of whether sanctions should be imposed.²¹⁵ Some attorneys are unconvinced of the need for spoliation insurance.²¹⁶ Their belief is that if an attorney feels the need to engage in conduct that gives rise to repeated sanction violations, then perhaps the attorney's offending conduct should be addressed so that there would be no need for spoliation coverage.²¹⁷ But, if litigation is between one or more massive conglomerates, spoliation insurance looks like a good prophylactic idea.²¹⁸ Even with the new technological change ushered in by the electronic age, our adversarial system is still rooted in the obliteration of an opponent.²¹⁹ Some believe that the electronic age will force parties to cooperate.²²⁰ For instance, in *Mancia v. Mayflower Textile Services Co.*, the court discussed the changing role that the electronic age would have on our adversarial system.²²¹ The court noted that our system would turn into one relying more on cooperation between parties.²²² But, due to the adversarial nature of our litigation system, the better parties understand their duties involving e-discovery, probably the more adept they will become at avoiding or camouflaging such duties in an attempt to win and get around sanctions.²²³ Avoidance or camouflage tactics will probably give rise to more sanctions.²²⁴

Lawyers will soon have another problem to contend with where failure to understand what is required for litigation in an electronic age is concerned. Failing to be up to speed in e-discovery or ignorance of the e-discovery language and tools can be an ethical violation.²²⁵ Other ethical issues for

214. *Id.* at 31.

215. *See id.* at 32.

216. *Id.*

217. *Id.*

218. *Id.*

219. PAUL & NEARON, *supra* note 21, at 168–69.

220. *Id.* at 169.

221. 253 F.R.D. 354, 360–63 (D. Md. 2008).

222. *Id.* at 365.

223. *See Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA 03-5045 AI, 2005 WL 674885, at *6–10 (Fla. Cir. Ct. Mar. 23, 2005) (finding that the defendant's repeated misrepresentation to the court regarding discovery compliance warranted sanctions of adverse inference jury instructions and attorneys' costs and fees, among others).

224. *Id.* at *9 (noting that Morgan Stanley had “deliberately and contumaciously violated numerous discovery orders”).

225. Joe Dysart, *A Discovery: Study Tech-Aided Review Before It's an Ethics Issue*, A.B.A. J., July, 2012, at 32, 32.

lawyers involve the type of e-discovery requests. The court in *Mancia* noted that ethical issues for lawyers arise when the requested discovery is excessive or when the lawyer's response to e-discovery requests is sluggish, evasive, or incomplete.²²⁶ In its discussion, the court referenced the Model Rules of Professional Conduct, and it is evident that there is an attaching ethical responsibility to a lawyer's fulfillment of the requirements of the FRCP, but specifically to those rules concerning discovery.²²⁷ An attorney's ethical obligations during discovery also arose in *Qualcomm Inc. v. Broadcom Corp.*, where the court affirmed the district court's finding of numerous ethical discovery violations by Qualcomm during a patent infringement case that led the court to find an exceptional case determination and to award attorneys' fees to Broadcom.²²⁸

As courts continue to adjudicate cases involving e-discovery, standards for preservation and spoliation will become clearer and clearer.²²⁹ Yet, why would the amended rules fail to have solutions to the rising costs of discovery²³⁰ that result when discovery problems arise during litigation? The answer, according to one author, is clear—the rules are broad because the drafters of the rules, mostly judges, have a preference for broad discretion.²³¹ This broad discretion is burdening every aspect of e-discovery litigation.

In light of the massive production of electronic information, courts, litigants, and society may have to look less for the truth in litigation to ensure some degree of predictability of what is required to satisfy preservation, spoliation, and sanction standards.²³² There have always

226. *Mancia*, 253 F.R.D. at 362–63.

227. *Id.* (noting that attorneys are required to be ethically above board in complying with the FRCP).

228. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1026–27 (Fed. Cir. 2008).

229. *See, e.g., Cedar Rapids Lodge & Suites, LLC v. JFS Dev., Inc.*, No. C09-0175, 2011 WL 4499259, at *9–10 (N.D. Iowa Sept. 27, 2011) (recommending denying a motion for sanctions against the defendant who had deleted electronic evidence after litigation started because the plaintiff failed to sufficiently show risk of prejudice); *Centrifugal Force, Inc. v. Softnet Commc'n, Inc.*, 783 F. Supp. 2d 736, 742 (S.D.N.Y. 2011) (finding that requiring litigation hold letters to be in writing when small companies are involved may be unnecessary where oral instructions could work better).

230. *See Hardaway et al., supra* note 13, at 535.

231. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1974–75 (2007).

232. *See Redish, supra* note 4, at 623–25.

been disagreements among circuits on different issues.²³³ Our system of litigation has never been perfect. E-discovery may very well be another of such issues where circuits and courts will have to agree to disagree.

233. See *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943–44 (11th Cir. 2005) (adopting the majority position, the court noted that “[c]ourts are split as to the question of whether state or federal law governs the imposition of sanctions for spoliation of evidence in a diversity suit. The majority of circuits have found that federal law applies.”); *Denver Health & Hosp. Auth. v. Beverage Distribs. Co.*, 843 F. Supp. 2d 1171, 1177 (D. Colo. 2012) (holding that FRCP 9(b) did not apply to a negligent misrepresentation claim and acknowledging that there is a circuit split on the issue); see also *Balt. Cnty. v. Cigna Healthcare*, 238 F. App’x 914, 921–22 (4th Cir. 2007) (noting that Rule 9(b) does not apply to negligent misrepresentation claims). But see *Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir. 2010) (noting that Minnesota law considers any misrepresentation claim, negligent or otherwise, to be a claim of fraud subject to Rule 9(b)’s requirements); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 583 (2d Cir. 2005) (holding that Rule 9(b) applies to negligent misrepresentation claims).